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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1512

CONSTANCE R. JOHNSON,
Petitioner,

v.

JOSEPH V. GARTLAN, JR., and
FREDONA M. GARTLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Constance R. Johnson, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above cause January 2, 1973, and the denial of a Petition for Rehearing entered February 12, 1973.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Eastern District of Virginia, entered December 6, 1971, is printed in Appendix A, hereto; *infra*, p. 1a. The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered January 2, 1973, is printed in Appendix B hereto, *infra*, p. 1b.

The Order of the United States Court of Appeals for the Fourth Circuit denying Petition for Rehearing, entered February 12, 1973, is printed on Appendix C, hereto, *infra*, p. 1c.

JURISDICTION

This writ of certiorari is requested pursuant to Title 28, Section 1254, United States Code.

QUESTION PRESENTED

When Internal Revenue Service delivers the proceeds of an illegal tax sale of real estate to the owner after the period of redemption has expired, is the owner, a person of limited education, deemed to have ratified the illegal acts of the Internal Revenue Service and estopped from tendering back said proceeds and challenging the illegal tax sale if he first accepts the proceeds without knowledge of the illegality of the Internal Revenue Service actions.

STATUTES INVOLVED

United States Code - Title 26, Sec. 6335, Appendix E.

STATEMENT

Constance R. Johnson brought this action in equity to quiet title of land presently held by Mr. and Mrs. Joseph V. Gartlan, Jr. Miss Johnson's late father, James N. Johnson, was the original owner of the land, which was seized and sold by the Internal Revenue Service to satisfy a tax claim against Mr. Johnson. The Gartlans' predecessor in title purchased the land at the tax sale.

The District Court held the tax sale void because the Internal Revenue Service failed to comply with the regulatory provisions of Title 26, Sec. 6335, U.S.C. regulating tax sales and violated its provisions by failing to divide and sell only as much land as necessary to pay the tax; by failing to give proper notice to the taxpayer and by selling outside of the county wherein the land was located, all of which acts the court found to be contrary to the Internal Revenue Code. As sole heir of Mr. Johnson, plaintiff was granted her prayer to quiet title upon payment by her to the defendants of their bid price, costs of sale and real estate taxes with interest.

In Mid-1962, Mr. Johnson was the sole owner of 172.15 acres of unimproved land in Prince William County, Virginia. Johnson was a taxi driver who resided in Washington, D.C. and maintained an Alexandria, Virginia, business address. Although Johnson could read and write, his education was limited.

On April 1, 1960, Johnson was assessed $586.15 by the United States government for unpaid income taxes from 1958. On July 2, 1962, the Internal Revenue Service obtained a statement of financial condition from Johnson and on July 25, 1962, the Internal Revenue Service filed a tax lien on his land.

On October 25, 1962, the Internal Revenue Service seized the entire 172.15 acres of land worth over $30,000

at that time and over $200,000 at the time of trial, to satisfy its lien. On November 8, the prospective sale was advertised in the Journal Messenger, Manassas, Virginia, and was posted at the Manassas and Dumfries post offices and at the Manassas courthouse. Revenue Officer Albert C. Nagle conducted the public sale under sealed bids on December 3, 1962, at the Internal Revenue Service office in Alexandria, Virginia.

The high bid, $16,825.38, was submitted by G.P. Manderfield, of Manassas, for himself and others. He was given a certificate of sale on January 2, 1963. The certificate was assigned by Manderfield to a trustee, Frank A. Hoss. The Internal Revenue Service issued a deed to the land to Hoss on February 14, 1964, which deed was recorded twenty-two months later in Prince William County on December 31, 1965.

Manderfield subsequently gave his interest in the land to his daughter and son-in-law, defendants Gartlan. He also agreed to buy out his partners' interest in the tax deed through an unsecured note for $32,000 payable interest only for five years. No payments of either interest or principal had been paid on the note.

On January 7, 1963, five days after the issuance of the Certificate of Sale to the tax deed purchaser, someone at Internal Revenue Service (the record does not indicate who) returned to Johnson a $100 money order he had sent as part payment on his delinquent taxes. The letter stated that his tax liability had been satisfied through the sale and that he had the right to redeem the property within a year from the sale date. This letter, however, was not addressed to Johnson at either his business address in Alexandria, or his home address in Washington, both of which addresses were on file with the tax office; but the letter was instead addressed without a street address and directed to Manassas, Virginia, where the taxpayer did not live.

On October 30, 1964, eight months after the issuance of the subject deed, the Internal Revenue Service sent a $13,636.35 check without explanation, to Johnson at his residence in Washington, D.C. No proof was offered that the endorsement on the check was that of the taxpayer or that he had received the check. He died intestate on April 1, 1967, two and one-half years.

Plaintiff, Constance Johnson, his sole heir, attained twenty-one years of age on March 28, 1968. Miss Johnson filed the instant diversity suit in equity to quiet title on October 30, 1969.

REASON FOR GRANTING THE WRIT

The United States District Court Judge found and the Court of Appeals agreed that the Internal Revenue Service had failed to comply with the statutes applicable to the forced sale of the taxpayers land for the payment of his taxes. Internal Revenue Service sold 172.15 acres of land worth over $30,000 to satisfy $586.15 in taxes, when the undeveloped land was clearly divisible. Internal Revenue Service did not give notice to the taxpayer of the seizure as required by statute and they sold the land outside of the county in which the land was located without a special order as required by statute. Any one of the three violations would have been sufficient to invalidate the tax deed. Therefore, in upholding the validity of the tax deed, the Appellate Court held that the subsequent acceptance by the taxpayer of the proceeds from this challenged sale constituted ratification. In so finding, the Court of Appeals established a different standard of estoppel as it applies to the protection of taxpayers against the misconduct of Internal Revenue Service as contrasted to the standards applied to dealings among ordinary citizens.

In the crucial part of the decision of the United States Court of Appeals for the Fourth Circuit, the court declared

> "We find that this case comes within the general rule, adhered to in Virginia, that acceptance of proceeds from a contested sale constitutes ratification of sale. *Hiatt v. Tompkins*, 10 S.E.2d 489 (Va. 1940); *Pattersons' Executors v. Patterson*, 131 S.E. 217 (Va. 1926); *Camp Mfg. Co. v. Green*, 106 S.E. 394 (Va. 1921)."

The doctrine of estoppel for which the three cited cases stand all reaffirm the legal requirement that in order to ratify an act, the person to be estopped must have knowledge of his rights. The Appellate Court in order to sustain the requirement of knowledge rejected by implication the direct finding by the Trial Judge that Mr. Johnson did not have knowledge. The cases cited by the court as declaring the general rule in Virginia "that acceptance of proceeds from a contested sale constitutes ratification of the sale" do not exclude the need for knowledge and in all of the cited cases there was actual knowledge on the part of the recipient of the proceeds and were so distinguished by the Trial Judge in his Opinion.

> "The cases relied upon by the defendants are factually different–in *Camp Mfg. Co. v. Green*, 106 S.E. 394, the court found express ratification of the sale–In *Patterson's Ex'rs v. Patterson*, 131 S.E. 217, the heir attended the sale, saw the land sold and receipted to the executors for his portion of the purchase money–In *Hiatt v. Tompkins*, 10 S.E.2d 489, the owners consented to a private sale and accepted part of the proceeds of sale.
>
> "There was no evidence in this case indicating that James N. Johnson either consented to or

attended the sale of his land or that he receipted for any of the proceeds of sale–In fact it is rather doubtful that he even knew that his land was sold–The revenue officer says he mailed him a copy of the notice of sealed bid sale–He did not say where he mailed the notice–If the landowner received this notice he obviously did not know what it meant–he could read and write but had a very limited education–because he sent the Internal Revenue Service a hundred dollar payment on his back taxes either shortly before or after the time his land was advertised for sale.

"The defendants rely heavily on the IRS letter of January 7, 1963, to Mr. Johnson from someone in Internal Revenue who returned his $100.00 money order and told him his land had been sold–This letter at best, if it had been received–it was mailed to Manassas, not to the landowner's Washington or Alexandria address listed on his tax return–would only show that Mr. Johnson learned of the sale after the fact–It does not establish ratification.

"To ratify, one must have full knowledge of his rights and of all the material facts–Johnson was never told who bought his land or what it was sold for–He did not receive the surplus until long after his right of redemption had expired.

"Clearly the evidence of estoppel here presented is far from being clear, precise and unequivocal." Memorandum Opinion and Order–United States District Judge, Appendix A, pp. 10a-11a.

The Opinion of the United States Court of Appeals for the Fourth Circuit written by the Senior Circuit Judge, Simon S. Sobeloff is directly contrary to the Opinion by a divided Three Judge Panel in which Judge Sobeloff, sitting by a special designation in the United States Court of Appeals for the District of Columbia Circuit, joined in

announcing a conflicting doctrine of estoppel *in pais* in the case of *In re: Estate of Dorothy Burrough v. American Security and Trust Company* (February 23, 1973; App. No. 71-1538), ___ App. D.C. ___, ___ F.2d ___, Appendix D.

In the *Burroughs* case, the Appeals Court reversed the decision of the District Court Judge granting summary judgment and rejected the proposition that the acceptance of the benefits under a will estopped the recipient from contesting the validity of the will.

It was the argument of Petitioners that the Gartlans, having asserted the defense of estoppel in the instant case, were required to carry a heavy burden. In *H. Trayer v. Bristol Parking*, 198 Va. 595, 95 S.E.2d 224 (1956), the court held:

> "The authorities are agreed that where one relies on estopped *in pais*, the burden is on him to prove the essentials of such an estoppel by clear, precise and unequivocal evidence. The evidence must not leave the matter to mere inference or conjecture. It must be certain is every particular."

The trial court found as a matter of fact that James N. Johnson did not have full knowledge of his rights and all of the material facts, and that the evidence of estoppel presented in this case was far from being clear, precise and unequivocal.

The Appellate Court, ignoring the findings by the Trial Judge, applied a different standard to measure ratification or estoppel by a taxpayer when the Internal Revenue Service has done the wrong as contrasted to those civil disputes between citizens. In the absence of a more thorough review by this court, the law will stand, as it now stands, that the acceptance by a taxpayer of the proceeds of an illegal sale, regardless of the taxpayer's

knowledge of the failure of the Internal Revenue Service to comply with the required procedures, serves to validate an otherwise invalid tax deed.

If, as the court said in *Burroughs supra,* "The doctrine of estoppel *in pais* is founded upon the principles of morality, and is intended to subserve the ends of justice", then what principle is served by applying a lesser standard to ratification of illegal tax sales by unknowledgable taxpayers than to other transactions between citizens.

Under the appellate decision in this case, the Internal Revenue Service may validate any illegal tax sale regardless of how fair or unfair they have been to the taxpayer and regardless of how many of the taxpayer's rights they may have ignored, by delivering the overage proceeds to the taxpayer, who, if he accepts the proceeds, regardless of knowledge, is thereafter barred from challenging the illegal sale of his land or possessions.

CONCLUSION

To protect the Petitioner and all taxpayers from the consequences of illegal tax sales, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

CONSTANCE R. JOHNSON, Plaintiff,
v.
JOSEPH V. GARTLAN, JR. and FREDONA M. GARTLAN, Defendants.

CA 330-69-A

Memorandum Opinion and Order

The plaintiff, the sole heir of the late James N. Johnson, brings this suit to quiet title to land taken from him by a federal tax sale.

The land in question is now titled in the name of the defendants, having been transferred to them by the assignee of the purchasers at the tax sale by special warranty deed dated March 27, 1967, recorded February 7, 1968.

The plaintiff claims the tax sale in question was not conducted in accord with the requisite federal statutes—The defendants say the sale was legal and proper in every respect—They also question the right of the plaintiff to bring this suit and seek dismissal on the ground of laches.

This is a diversity action involving more than $10,000.00 —The plaintiff is the sole heir of the landowner—As such she has standing to question the validity of the tax sale in question.

This suit was filed October 3, 1969. The tax deed to Frank A. Hoss, Jr., assignee of the purchasers, was recorded among the land records of Prince William County, Virginia, on December 31, 1965—The late landowner, James

N. Johnson, died April 1, 1967. The plaintiff reached her twenty-first birthday on March 28, 1968—She did not sleep on her rights—This suit was timely filed.

Whether the sale and transfer of this land was valid depends upon whether or not the Internal Revenue Service fully complied with §§ 6335 and 6337-6339 of Title 26 of the United States Code.

From the record here made, the Court finds that in 1962 the late James N. Johnson was a retired small restaurant owner and taxicab driver—He then lived at 742 Ingraham Street, Washington, D. C.—His business address was RFD 6, Box 402, Alexandria, Virginia, c/o John Gillis—He then owned some 172 acres of unimproved scrub pineland in Prince William County, Virginia—Judgments in the amount of some $4,500.00 were recorded against him in Prince William County—He then owed the federal government $486.15 for 1958 federal income taxes—Internal Revenue was having difficulty in collecting this money—It filed a federal tax lien for $586.15 in Prince William County on August 1, 1962.

The record of seizure and sale of real estate (IRS Form A-24) recites the land was seized October 26, 1962—that notice of seizure was mailed to the owner on that day—and that notice of sale was mailed to him on November 8, 1962—Although this form lists the taxpayer's Washington and Alexandria addresses, there is nothing on the form indicating where these notices were mailed.

The notice of sealed bid sale describes the property by metes and bounds and states the property will be sold in accordance with the provisions of § 6335 of the Internal Revenue Code at public sale under sealed bids which will be opened on December 3, 1962 at ten o'clock a.m. at 701 Prince Street, second floor, Room 201, Alexandria, Virginia —that only the right, title and interest of James N. Johnson in and to the property is offered for sale—that the bids must be submitted directly to Albert C. Nagle, Revenue

Officer, 701 Prince Street, Alexandria, Virginia, prior to the time set for the opening of bids—and that twenty per cent of the bid or $200.00, whichever is greater, must be submitted with the bid, the balance of the purchase price to be paid on or before January 3, 1963.

The sale was advertised in the Journal Messenger, a Prince William County newspaper, on November 8, 1962.

G. P. Manderfield of Manassas, Virginia, submitted a sealed bid of $16,825.38 for himself and others—He was given a certificate of sale for the property on January 2, 1963. He assigned the certificate of sale to Frank A. Hoss, Jr., trustee—A deed to the land in question was given to him by the Director of Internal Revenue Service, Richmond District, on February 14, 1964—This deed was recorded in Prince William County on December 31, 1965.

The defendants are the daughter and son-in-law of G. P. Manderfield—He gave them his interest in this land and made arrangements for their buying out his partners for a $32,000.00 note—payable interest only for five years.

The defendants attempted to secure title insurance on this property, without success, due to infirmities in the tax sale—They have paid the real estate taxes on the land but have not paid the judgment liens which were recorded against this land prior to the date of the federal tax sale.

Someone in the Alexandria Internal Revenue office (the copy of the letter is unsigned) mailed James N. Johnson a letter dated January 7, 1963, addressed to him at Manassas, Virginia, returning his money order for $100.00 which he had previously sent them as a payment on his then delinquent income taxes—They told him in the letter that his tax liability had been satisfied by the sale of his real estate in Prince William County and that he had the privilege of redeeming his property within a year from the date of sale upon paying the buyer the purchase price plus twenty per cent interest for his venture.

Internal Revenue mailed Mr. Johnson at his Washington address a United States Treasury check in the amount of $13,636.35 dated October 30, 1964. There is nothing on this check indicating what it was for, or a covering letter stating what the money was for.

The $586.15 federal tax lien was released by the District Director and recorded among the land records of Prince William County on June 25, 1964.

Laws permitting the sale of a man's land must be strictly construed—Chief Justice Marshall so stated many years ago when he said

> "That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court." Thatcher v. Powell, 6 Wheat. 119, 5 L.Ed. 221.

The Fourth Circuit has gone even further. In United States v. Heffner, 420 F.2d 809 (1969), Judge Winter declared

> "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."

Further, the burden of showing literal compliance with statutes governing the sale of land for taxes is upon the claimant under the tax sale. See McAndrews v. Belknap, 141 F.2d 111 (6th Cir. 1944).

The claimant here has not carried that burden.

Internal Revenue in making this sale has not complied with the requirements of § 6335(a)[1] or with the requirements of § 6335(d).[2]

This sale from the beginning to the end was handled by Revenue Officer Albert C. Nagle of the Alexandria office. He says he discussed the collection with his supervisor and that he was authorized to go ahead with the sale—that if it did not comply with the statute it was his fault—He says he made the seizure and that he alone made the decision to sell the land by sealed bid—and to make the sale outside the county where the land is located—It was winter and he thought it would be more convenient to receive the bids in his Alexandria office—He further stated that he never gave a thought to selling a portion of the land—He said he did not have any means of dividing it—and as far as he knew, the Internal Revenue Service always sold real estate as a whole unless it was recorded in lots or parcels. He further says he knew this land would bring considerably more than the amount due for expenses of sale and the delinquent taxes—He also stated he personally prepared the newspaper ad, the notice of levy[3] and the notice of sale by sealed bid (IRS Form 2434), which he considered to be the notice of seizure—He says he mailed a copy of IRS Form 2434 to the landowner and sent the ad to the Journal Messenger in Manassas for publication—He did not go on the land or post it. He further stated that he was not personally pres-

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[1] "(a) Notice of seizure.—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property . . . or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, . . . in the case of real property, a description with reasonable certainty of the property seized."

[2] "(d) . . . The place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate."

[3] The notice of levy was signed by his supervisor as he had no authority to make a levy.

ent in Alexandria on December 3, 1962 when the sealed bids were opened.

Revenue Officer Nagle says he relied on Delegation Order No. 97 and TM 5300-10 of the Internal Revenue Manual as his authority for fixing the place of sale outside the county where the land is located.

That delegation order did not authorize a revenue officer to fix the place of sale outside of the county—It only delegated authority to place advertising orders with newspapers or other similar types of commercial advertising media in cases involving seizure and sale.

TM 5300-10 does provide "the notice of sale designating such place shall be considered to be the order made by the District Director that the sale be held in such other place." That regulation, however, does not make the recitals in the notice of sale a verity—At best they are only prima facie evidence of the purported facts stated therein. Here the direct evidence of the revenue officer who handled this sale is to the contrary—He admits that he alone made the decision requiring the sealed bids to be sent or brought to the Internal Revenue office in Alexandria—He says he did not even discuss it with the Director.

Clearly § 6335(d) provides that the place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate. No such special order was here given, and the Court so finds.

The Court further finds that the sealed bids were received and opened at 701 Prince Street, Alexandria, Virginia, and the tax deed was issued in Richmond, Virginia, neither of which is within Prince William County, the place where the land in question is located.

The Court further finds that neither the seizure nor the notice of seizure were made or given to the landowner as required by the express provisions of § 6335(a)—Nothing whatsoever was done to seize this land except to record the levy for unpaid taxes in Prince William County. Whether

that alone—there was no posting or going upon the land—is sufficient for a legal seizure of land is debatable to say the least—This, however, need not be decided here because there is no evidence that a notice of seizure as required by statute was ever given to the landowner or left at his usual place of business—except the recital on IRS Form A-24. That form says a notice of seizure was mailed to the landowner on October 26, 1962—This is only prima facie evidence.

The revenue officer says he only made out and mailed one form to the owner, IRS Form 2434—the "Notice of Sealed Bid Sale"—He considered this form a notice of seizure. The record of seizure and sale form says IRS 2434 was mailed to the owner on a different date, namely, November 8, 1962. It is not stated to which address these notices were mailed.

Section 6335(a) expressly provides that the notice of seizure shall be given to the owner of the property or shall be left at his usual place of abode if he has such within the internal revenue district—Neither was done here—One might argue that mailing the notices constitutes "giving" or "leaving"—However, this statute expressly states that the notice of seizure may be mailed to the landowner's last known address only if the owner cannot be readily located or has no place of business within such district—There is no evidence in this case that this landowner could not be readily located—The internal revenue officer knew where the taxpayer lived and that his business address in the district was RFD 6, Box 402, Alexandria, c/o John Gillis.

Further, the revenue officer who handled this sale says that he considered IRS Form 2434 (Notice of Sale by Sealed Bid) as the notice of seizure and that this is the form he sent to the landowner.

Even if this form were received, it is no substitute for a § 6335(a) notice of seizure for the simple reason that the notice of seizure required by that section of the Code requires that such notice "shall specify the sum demanded

and shall contain . . . in the case of real property, a description with reasonable certainty of the property seized." The amount demanded is not disclosed on IRS Form 2434.

Clearly the requirements of § 6335(a) of Title 26 of the United States Code were not fully complied with in this case, and the Court so finds.

The delinquent income taxes in this case, including interest, amounted to $586.15—The land purportedly seized encompassed some 172 acres of unimproved scrub pineland, much of which fronted on public roads. The revenue officer knew that this land was worth much more than the back taxes and the costs of sale. All of the realty experts who testified in this case said the land was worth somewhere between thirty and fifty thousand dollars—The only liens against this land at the time of sale were some $4,500.00 judgment liens—The purchaser at the tax sale must have valued the land at $64,000.00 when he gave his one-half interest to his daughter and son-in-law in 1964—(He bought a half interest for $32,000.00.)

Yet the revenue officer admitted he never at any time considered selling only a part of this land to collect the back taxes—He made the decision to sell all of it without even discussing the matter with his superiors.

It is rather hard to read § 6335(c)[4] of the Internal Revenue Code as permitting the sale of the whole if the real estate is divisible and the sale of a part will raise the whole amount of the taxes and expenses—Clearly this land was divisible—It was unimproved scrub pineland—A sale of a few acres—ten or twenty at best—would have brought more than enough to pay the approximately $600.00 due in back taxes and expenses.

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[4] "(c) . . . If any property liable to levy is not divisible, so as to enable the Secretary or his delegate by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold."

"... [T]he Supreme Court has declared that when it does not affirmatively appear in a sale of the entire land that no one would bid the amount of the taxes and costs for less than the whole, or that the land was incapable of division, the sale is invalid." See McAndrews v. Belknap, supra.

No such showing has here been made.

Further, although § 6337(b)[3] does not require that notice of the right of redemption be sent to the landowner, if Internal Revenue takes it upon itself to give such notice—as it here says it did—the notice should properly advise the landowner in the premises. Here it told the taxpayer he could redeem within one year from the date of the sale but it neglected to give him the date from which the time began to run—It told him he could redeem his land by paying the buyer the bid price plus twenty per cent for his venture but it neglected to give him the name of the buyer or the bid price.

Further, by selling all of Mr. Johnson's land and by retaining the surplus for almost a year after his right to redeem had expired, the Internal Revenue Service not only impaired this man's statutory right to redeem—for all practical purposes it made it impossible for him to do so. See McAndrews v. Belknap, supra.

The defendants' claim that the plaintiff is estopped from questioning the validity of the sale because her late father ratified the sale when he accepted the proceeds of sale is not supported by the record.

[3] "(b) Redemption of real estate after sale.—

"(1) ... The owners of any real property sold as provided in section 6335, their heirs ... or any person having any interest therein, ... or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within [at the time of this sale—one year] after the sale thereof ...

"(2) ... upon payment to the purchaser ... the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum."

Accepting a check from the Government, under the circumstances here shown, standing alone is not enough.

> "The authorities are agreed that where one relies on estoppel in pais, the burden is on him to prove the essentials of such an estoppel by clear, precise and unequivocal evidence. The evidence must not leave the matter to mere inference or conjecture; it must be certain in every particular." H. M. Trayer v. Bristol Parking, 198 Va. 595, 95 S.E. 2d 224 (1956).

The cases relied upon by the defendants are factually different—In Camp Mfg. Co. v. Green, 106 S.E. 394, the court found express ratification of the sale—In Patterson's Ex'rs v. Patterson, 131 S.E. 217, the heir attended the sale, saw the land sold and receipted to the executors for his portion of the purchase money—In Hiatt v. Tompkins, 10 S.E.2d 489, the owners consented to a private sale and accepted part of the proceeds of sale.

There was no evidence in this case indicating that James N. Johnson either consented to or attended the sale of his land or that he receipted for any of the proceeds of sale—In fact it is rather doubtful that he even knew that his land was sold—The revenue officer says he mailed him a copy of the notice of sealed bid sale—He did not say where he mailed the notice—If the landowner received this notice he obviously did not know what it meant—he could read and write but had a very limited education—because he sent the Internal Revenue Service a hundred dollar payment on his back taxes either shortly before or after the time his land was advertised for sale.

The defendants rely heavily on the IRS letter of January 7, 1963 to Mr. Johnson from someone in Internal Revenue who returned his $100.00 money order and told him his land had been sold—This letter at best, if it had been received—it was mailed to Manassas, not to the landowner's Washington or Alexandria address listed on his tax return—would only show that Mr. Johnson learned of the sale after the fact—It does not establish ratification.

To ratify, one must have full knowledge of his rights and of all the material facts—Johnson was never told who bought his land or what it was sold for—He did not receive the surplus until long after his right of redemption had expired.

Clearly the evidence of estoppel here presented is far from being clear, precise and unequivocal.

This is a suit in equity. The plaintiff has tendered the bid price plus the costs of the sale, together with interest —The defendants want the present fair market value of the land and nothing less.

Although the defendants have obligated themselves on a $32,000.00 note given to one of the original buyers at the tax sale and have paid some $6,630.74 in real estate taxes —they are not innocent purchasers, solely relying on the recital set out in the Director's tax deed—One of them is a lawyer—The principal buyer at the tax sale was his father-in-law—He had actual knowledge of the alleged infirmities in the tax sale—He was so informed by the title insurance company when he applied for title insurance.

Whether the defendants' obligation on the $32,000.00 note is enforcible is not before this Court for determination—but a buyer of real property at a tax sale can transfer no better title than he has.

The tax sale is not only invalid—not being in accord with the requisite federal statutes—it shocks the conscience of the Court.

Clearly the Internal Revenue Service has the duty of collecting all taxes due the federal government—but it had neither the duty nor legal authority to sell this man's undivided land—some 172 acres—under the conditions and circumstances here revealed—to collect some $586.15 in back income taxes.

The tax sale and the tax deed will be declared invalid and held for naught, and the Court will grant the plaintiff's prayer to quiet title upon her paying the defendants the bid price, plus the costs of sale and real estate taxes paid, together with six per cent interest per annum, within thirty days from the date hereof; and

It Is So Ordered.

The attorney for the plaintiff shall forthwith prepare such further order as he deems necessary to quiet title, submit the same to counsel for the defendants for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ OREN R. LEWIS
United States District Judge

November 4, 1971

[Filed December 6, 1971]

Order

This cause, having come on for trial before the Court sitting without a jury and, upon consideration of the testimony of the witnesses for the Plaintiff and for the Defendants, the documents offered and received into evidence, the arguments of counsel had thereon and briefs filed herein, and it appearing to the Court that the tax sale which occurred on December 3, 1962 represented by a Certificate of Sale dated January 2, 1963 and thereafter by a Deed from the District Director of Internal Revenue Services to Frank A. Hoss, Jr., Trustee, dated February 14, 1964 and recorded December 31, 1965 in Deed Book 378, at page 542 of the Land Records in the Circuit Court of Prince William County, Virginia, is invalid and should be held for naught, and that the Special Warranty Deed from Frank A. Hoss, Jr., Trustee to Joseph V. Gartlan,

Jr. and Fredona M. Gartlan, dated March 27, 1967 and recorded February 7, 1968 in Deed Book 454, at page 113 of the Land Records in the Circuit Court of Prince William County, Virginia, is consequently invalid and should be held for naught, and that the title to 172.15 acres more or less of undeveloped land more fully described as:

> Lying and being situate in (the Former) Coles Magisterial District, Prince William County, Virginia, on the south side of State Route 234, near Independent Hill, and more particularly described as follows:
>
> Beginning at a stone, corner to the National Park Service then N. 15° 25′ 00″ E., 389.00 ft. more or less, to the south side of State Route 234, thence with the south side of the said State Route 234, the following courses and distances; N. 46° 53′ 40″ W., 91.09 ft. more or less, to a curve to the left, said curve having a radius of 5704.58 ft., and an arc distance of 1400.53 ft; thence N. 60° 57′ 40″ W., 234.80 ft.; N. 63° 49′ 10″ W., 100.11 ft.; N. 60° 57′ 40″ W., 600.00 ft.; N. 58° 06′ 10″ W., 100.13 ft., N. 60° 57′ 40″ W., 500.00 ft.; N. 66° 40′ 00″ W., 100.49 ft.; N. 60° 57′ 40″ W., 400.00 ft.; N. 58° 08′ 00″ W., 200.10 ft., to a curve to the left, said curve having a radius of 1884.86 ft., and an arc distance of 387.76 ft., thence N. 73° 25′ 40″ W., 307.10 ft. and N. 76° 17′ 30″ W., 87.33 ft., to the northeast corner of 13.95 acre tract; thence departing from the said road and running along the east line of the said 13.95 acre tract, S. 9° 00′ 00″ W., 2554.00 ft., more or less, to a point in the outer boundary of the whole tract and in the line of Burke; thence with the line of Burke, S. 20° 56′ 00″ E., 919.70 ft., more or less, to a stone, corner of the Poor House tract, and thence the following courses and distances, with the line of the Poor House tract, N. 84° 58′ 00″ E., 1130.10 ft., to a stone N. 63° 42′ 00″ E., 1058.20 ft., to a stone; N. 17° 30′ 00″ E., 1023.50 ft., to a stone; and S. 61° 28′ 00″ E. 1679.70 ft., to the place of beginning, containing 172.15 acres, more or less,

is quieted in the name of Constance R. Johnson, the Plaintiff herein; provided, however, that Plaintiff pay to the Defendants the bid price plus the costs of sale and real estate taxes paid—or, to wit, $16,843.00, with interest at six per cent per annum, from December 3, 1962, plus $6,630.74, with interest at six per cent per annum from the date of each payment, on or before thirty days from date, it is by the Court,

ADJUDGED, ORDERED and DECREED That the Deed from the District Director of Internal Revenue Services to Frank A. Hoss, Jr., Trustee, dated February 14, 1964 and recorded December 31, 1965 in Deed Book 378, at page 542 of the Land Records in the Circuit Court of Prince William County, Virginia, be and the same hereby is declared invalid and held for naught; and it is further

ORDERED, That the Special Warranty Deed from Frank A. Hoss, Jr., Trustee to Joseph V. Gartlan, Jr. and Fredona M. Gartlan, dated March 27, 1967 and recorded February 7, 1968 in Deed Book 454, at page 113 of the Land Records in the Circuit Court of Prince William County, Virginia be and the same hereby is declared invalid and held for naught; and it is further

ORDERED, That the title to 172.15 acres of land, as more fully set forth hereinabove, be and the same hereby is quieted in the name of Constance R. Johnson, provided that the tender of payment of $33,371.51 be made to the Defendants on or before thirty days from the entry of this Order, and that evidence of said tender be filed in this cause.

OREN R. LEWIS
Oren R. Lewis
Judge
United States District Court for the Eastern District of Virginia
Alexandria Division.

ENTERED: December 6, 1971.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1292

Constance R. Johnson,

Appellee,

versus

Joseph V. Gartlan, Jr., and
Fredona M. Gartlan,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued September 15, 1972. Decided January 2, 1973.

Before SOBELOFF, Senior Circuit Judge, WINTER, Circuit Judge, and THOMSEN, Senior District Judge.

SOBELOFF, Senior Circuit Judge:

Constance R. Johnson brought this action in equity to quiet title of land presently held by Mr. and Mrs. Joseph V. Gartlan, Jr. Miss Johnson's late father, James N. Johnson, was the original owner of the land, which was seized and sold by the Internal Revenue Service to satisfy

a tax claim against Mr. Johnson. The Gartlans' predecessor in title purchased the land at the tax sale.

The District Court held the tax sale void because the IRS violated provisions of the statute regulating such sales. As sole heir of Mr. Johnson, plaintiff was granted her prayer to quiet title upon payment to the defendants of their bid price, costs of sale and real estate taxes with interest.

We reverse the District Court's ruling and find for the Gartlans because Mr. Johnson ratified the tax sale, despite the failure of the IRS to strictly comply with the regulatory provisions of the tax sale statute.

I - FACTS

In mid-1962 Mr. Johnson was the sole owner of 172.15 acres of unimproved land, overgrown with scrub pines, in Prince William County, Virginia. Johnson was a taxi driver, who resided in Washington, D.C., and maintained an Alexandria, Virginia, business address. Although Johnson could read and write, his education was limited.

On April 1, 1960, Johnson was assessed $586.15 by the United States government for unpaid income taxes from 1958. Other judgments totaling $4500 were recorded against Johnson in Prince William County and were secured by liens on the property.

On July 2, 1962, the IRS obtained a statement of financial condition from Johnson and on July 25, 1962, the IRS filed a tax lien on his land. The lien was docketed on August 1 in the Circuit Court of Prince William County, Virginia.

On October 25, 1962, the IRS seized the land to satisfy its lien. On November 8, the prospective sale was advertised in the Journal Messenger, Manassas, Virginia, and was posted at the Manassas and Dumphries post

offices and at the Manassas courthouse. Revenue Officer Albert C. Nagle conducted the public sale under sealed bids on December 3, 1962, at the IRS office in Alexandria, Virginia.

The high bid, $16,825.38, was submitted by G.P. Manderfield, of Manassas, for himself and others. He was given a certificate of sale on January 2, 1963. The certificate was assigned by Manderfield to a trustee, Frank A. Hoss. The IRS issued a deed to the land to Hoss on February 14, 1964. The deed was recorded in Prince William County on December 31, 1965.

Manderfield subsequently gave his interest in the land to his daughter and son-in-law, defendants Gartlan. He also agreed to buy out his partners' interest in the tax deed, through an unsecured note for $32,000, payable interest only for five years.

On January 7, 1963, someone at IRS (the record does not indicate who) returned to Johnson a $100 money order he had sent as part payment of his delinquent taxes. The letter was originally mailed to Johnson at Manassas, where he had no address, and stated that his tax liability had been satisfied through the sale and that he had the right to redeem the property within a year from the sale date.

The next step in the chronology of events proves crucial to our disposition of this case. On October 30, 1964, the IRS sent Johnson a $13,636.35 check. Johnson endorsed the check and kept the money, never questioning nor contesting the tax sale. He died intestate on April 1, 1967, two and one-half years after receiving and cashing the check.

Plaintiff Constance Johnson, his sole heir, attained twenty-one years of age on March 28, 1968.

On September 20, 1969, Miss Johnson granted an option to sell the land to Hall Associates, Inc., for $1.

Miss Johnson filed the instant diversity suit in equity to quiet title on October 30, 1969.

II - THE TAX SALE

26 U.S.C. §§6335-39 are the statutory provisions that regulate procedures for seizure and sale of property to satisfy claims for unpaid federal taxes. We find that although the instant sale did not completely comply with the statute, nevertheless, for the reasons set forth in section III of this opinion, the delinquent taxpayer, Mr. Johnson, ratified the sale.

Under §6335(d)[1] the sale should have been conducted in Prince William County, where the seized property was located. The IRS sold the land on December 3, 1962, at its Alexandria, Virginia office. The Gartlans claim that the IRS revenue officer had authority to conduct the sale in Alexandria. Whether or not this is true is not clear based upon the record before us. At the oral hearing the Gartlans raised a stronger argument for upholding the sale, contending that a higher price was gotten in Alexandria than could have been obtained at a sale in rural Prince William County, in the cold month of December, where fewer buyers would appear. They argued that this departure from the statute was for the benefit of the landowners We need not decide this issue.

Miss Johnson raises an additional challenge to the validity of the sale, because although the property was divisible and her father owed only $586.15 in back taxes,

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[1](d) Time and place of sale.–The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate.

the entire 172.15 acres were sold. This, the plaintiff argues, violated §6335(c).[2] The entire tract was worth over $30,000, and only part of it need have been sold to satisfy the back tax claim, *McAndrews v. Belknapp*, 141 F.2d 111, 114 (6th Cir. 1944).

Additional uncertainty surrounds the adequacy of the notice of seizure given under §6335(a).[3]

The general rule is that strict compliance with statutory provisions is required to validate tax sales, *City of Richmond v. Monument Ave. Development Corp.*, 34 S.E.2d 223 (Va. 1945); citing with approval *Thatcher v. Powell*, 6 Wheat. 119 (1821). We fully expect the IRS to comply with the statute in conducting tax sales, something which was not done in the instant case, at least in regards to the divisibility question.

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[2](c) Sale of indivisible property.–If any property liable to levy is not divisible, so as to enable the Secretary or his delegate by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

[3](a) Notice of seizure.–As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

III - RATIFICATION

Despite the government's failure to comply strictly with the statute, we hold that the tax sale must be regarded as valid because Mr. Johnson subsequently ratified it through his actions, in accepting and cashing the IRS check. While it is true that the record does not indicate that any explanation accompanied the check, telling Johnson that the check was the proceeds of the tax sale, it strains our imagination to believe Johnson did not know that was the reason for the payment. No honest man pockets over $13,000 if he does not know what it is for, without asking the drawer for an explanation.

We find that this case comes within the general rule, adhered to in Virginia, that acceptance of proceeds from a contested sale constitutes ratification of the sale. *Hiatt v. Tompkins*, 10 S.E.2d 489 (Va. 1940); *Pattersons' Executors v. Patterson*, 131 S.E. 217 (Va. 1926); *Camp Mfg. Co. v. Green*, 106 S.E. 394 (Va. 1921).

Although the IRS failed to comply with the strict statutory regulations, Johnson's subsequent ratification served to validate the tax sale. Miss Johnson has no greater right than her father had and is bound by his actions, *Patterson's Executors v. Patterson, supra.* Accordingly we hold that Mr. and Mrs. Gartlan are entitled to the property, as successors in title to the purchasers at a valid tax sale. The judgment of the District Court is

Reversed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-1292

Constance R. Johnson,

Appellee,

v.

Joseph V. Gartlan, Jr., and
Fredona M. Gartlan,

Appellants.

ORDER

The petition of Constance R. Johnson for rehearing having been read and considered, it is, with the concurrence of Judge Sobeloff and Judge Thomsen,

ORDERED that said petition be denied.

For the Court:

/s/ Harrison L. Winter
United States Circuit Judge

A True Copy, Teste:
William K. Slate, II, Clerk
By /s/ Diane Burke
Deputy Clerk

Entered
2-12-73

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1538

IN RE: ESTATE OF DOROTHY H. BURROUGH, DECEASED

ANN BURROUGH (DONOVAN) CENNAMO, APPELLANT

v.

AMERICAN SECURITY & TRUST COMPANY, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided February 23, 1973

Anthony D. Cennamo, was on the brief for appellant.

John L. Laskey, was on the brief for appellee Cynthia D. Reiche and Dean S. Reiche, Guardian ad Litem. *Arthur C. Elgin* was on the brief for Janet T. Reiche.

Benton C. Tolley was on the brief for American Security & Trust Company.

Before SOBELOFF,* *United States Senior Circuit Judge*

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

for the Fourth Circuit, TAMM and LEVENTHAL, *Circuit Judges.*

Opinion for the Court filed by Circuit Judge Leventhal. Dissenting opinion filed by Circuit Judge Tamm at p. 9.

LEVENTHAL, *Circuit Judge*: On November 14, 1969, appellant filed a caveat contesting the validity of the will executed by her mother on March 5, 1969, some two months prior to death and a codicil thereto, executed on April 24, 1969. The caveat alleged fraud, undue influence and lack of testamentary capacity, and, after amendment, further alleged that a testamentary trust violated the rule against perpetuities.

Appellant is the sole heir at law of the testatrix. She is also the beneficiary under a 1966 will under which she would obtain substantially all of her mother's property, though full enjoyment would be postponed until she became 35.[1] The 1969 will and codicil would, if effective, operate to reduce appellant's interest substantially.[2]

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[1] After some bequests not here relevant, the residuum of the mother's estate was to be placed in trust. Appellant was the sole income beneficiary of this trust, and the trustee was empowered to invade the principal in his discretion for her use and benefit. Upon reaching the age of 35, the trust was to terminate; and appellant was to succeed to the entire corpus.

[2] Appellant was to receive a cash bequest of $5,000 and title in fee to certain realty. The residue of the estate was again placed in trust, with appellant the only income beneficiary. The trustee was directed to apply the sum of $10,000 from the principal for appellant's benefit (should she remarry and desire to purchase a home) and was vested with discretion to invade the corpus in her favor. The 1969 testamentary trust was to terminate upon the appellant's death; she was given no interest in the remainder.

Under the codicil, appellant's cash bequest was reduced to

Appellant consented to admission to probate of the 1969 testamentary documents but specifically reserved her right to file a caveat thereto. The appellant accepted distributions made to her pursuant to the will, both prior to and subsequent to her filing of the caveat, amounting to $17,000 as of September 3, 1970.

The trustee bank, and the guardians ad litem of those who are residuary beneficiaries under the trust established by the 1969 will, sought summary judgment.

The District Court granted summary judgment on the ground that the acceptance of benefits under a will estops the recipient from contesting the validity of a will. The court relied on *Utermehle* v. *Norment,* 22 App.D.C. 31 (1903), aff'd 197 U.S. 40 (1905), and found that there was no supported contention of any fraud or misrepresentation which might operate to avoid the rule of estoppel.

Appellant relied in the District Court on the undisputed fact that the amounts she received under the 1969 will were less than the amounts she would have received under either intestacy or the prior will and emphasized (1) that there are no other beneficiaries who have received distributions under the will who would be affected by the challenge, (2) that under the traditional estoppel analysis, in order for a party to be estopped (here from objecting to the will's validity), there must be not only acquiescence in validity on his part, but also a change in position on the part of others, a condition which both existed in *Utermehle* and was relied on in the *Utermehle* opinion.[3]

$3,000, and the trustee was directed to set aside only $5,000 from the principal in the event appellant wished to purchase a residence. The codicil also gave the trustee a discretionary power to invade principal for appellant's benefit.

[3] Both in the Supreme Court, as appears below, and in this court, see 22 App.D.C. at 48-49, 53-54.

The District Court quoted language from *Utermehle* which it considered to shed light on its rationale, and concluded that "the above quotation indicates that the Court found that these additional elements support estoppel, but that they are not necessary elements."[4] However, the District Court did not take note of subsequent passages in *Utermehle,* both one which emphasized—with italics—that in a Massachusetts precedent relied on by the caveator, the legatee had returned the legacy before the executor had settled the account "or the position of any other person had been changed," and the concluding paragraph of *Utermehle,* set forth in our footnote, that emphatically stressed the change-of-position factor.[5]

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[4] The District Court quoted the following paragraphs:

> As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from at the same time attacking the validity of the very instrument under which he received the benefit. 197 U.S. at 57.
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> * * *
>
> When *in addition* to the fact that he took a benefit under the will, a party has acquiesced in its validity for many years, and the opposing party in interest has acted upon such consent and acquiescence, and has so changed his position on that account that he cannot be restored to it, and where witnesses have in the meantime died, the reason for the rule upon which an estoppel is founded is *thereby greatly strengthened.* 197 U.S. at 58 (emphasis added).

[5] See 197 U.S. at 60: "In this case the position of other parties to this litigation has most materially changed, as has already been shown . . . while the plaintiff in error has been also guilty of extreme negligence even in attempting to discover what he alleges are facts. We are satisfied that the plaintiff in error is estopped from now contesting the will, and that great injustice would result from the overturning of the principle adjudged in so many cases."

We turn to *Bowen* v. *Howenstein*, 39 App.D.C. 585 (1913). The court there considered whether there was an estoppel on the sister of the testatrix by virtue of her having consented to probate, and thereafter accepted, and receipted, certain items of jewelry. Justice Robb's analysis ran as follows:

a. "The doctrine of estoppel *in pais* is founded upon principles of morality, and is intended to subserve the ends of justice."

b. It is the general rule that a party is not estopped by an act unless it operates to the prejudice of him who relies on it as estoppel.[6]

c. The statute provides for caveat by an interested person, within specified time periods, after admission to probate.

d. "[It] must be presumed that Congress, in the enactment of this provision, was cognizant of the general rule deductible from the foregoing cases, that a party will not be estopped unless the act relied upon has resulted in the prejudice of him who relies upon it as an estoppel."

This reasoning is clear and authoritative. Congress has provided in D.C. Code § 18-509 (1967):

> After a will has been admitted to probate, a person in interest may, within six months from the date of

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[6] Thus the court quoted from Reynolds v. Adden, 136 U.S. 348, 352 (1890): "[The acts] induced no conduct on the part of the appellant, or of any of the creditors of John H. Adden, which operated to their prejudice. They contained no element of estoppel."

And from Smith's Ex'r v. Powell, 98 Va. 431, 36 S.E. 522, 524 (1900): "It is of the essence of estoppel that the act relied upon as such should have been injurious, and to the prejudice of him who relies upon it as estoppel."

And to like effect the court quoted from Brady v. Elliott, 181 Pa. 259, 37 Atl. 343 (1897), and cited Lincoln v. Gay, 164 Mass. 537, 42 N.E. 95 (1895); Drouin v. Boston & M. R. Co., 74 Vt. 343, 355, 52 A. 957, 960 (1902).

> the order of probate, file a verified caveat to the will, praying that the probate therof be revoked.

The only doctrine that Congress may fairly be said to have contemplated as a limitation by way of estoppel on the statutory right of caveat, which is set forth without qualification for all parties in interest, is that provided by the general law of estoppel; and that requires that the party relying on an act as an estoppel show prejudice therefrom.

There is requisite prejudice and estoppel when a party makes a claim outside the will after taking property under a will to which he would not otherwise have been entitled. And so in *Gibson* v. *Gibson*, 53 App.D.C. 380, 292 F. 657 (1923), the court held, in another opinion by Justice Robb, that the principle of *Utermehle* prevented a husband from both claiming curtesy and at the same time taking an interest under the will that was given to him in lieu of curtesy. This was held to be inequitable, and the husband was required to elect one or the other. But there is no comparable problem of equity and election when the claimant, as here, is entitled to the property taken under the will even if he succeeds in the claim outside and against the will.

It cannot be said that there is any inherent inequity in a relative's seeking to break a will when she has taken under the will. Her claim is that the deceased intended to provide amply for her and that this was thwarted by the intervention of say, undue influence or failure of capacity.[7]

This brings us, finally, to appellee's claim that estoppel may be avoided only if there has been a prior proffer of the item received. The requirement of proffer is not unqualified but calls for application in the interest of justice.

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[7] We expressly do not consider the situation of a will that provides a legacy given on condition that no attempt be made to declare the will invalid. *Cf.* Smithsonian Institution v. Meech, 169 U.S. 398 (1898).

In Maryland, whose rulings are paid particular heed in trust and estate questions, the court put it that it is "only in the event that his contemplated attack upon the will would be successful that there would be any occasion for him to refund the legacy paid to him by the executor."[8] There may be other considerations of justice bearing on the tender problem.[9] We do not pursue the problem. It suffices that the lack of proffer prior to suit is not an absolute bar, and that whether and on what terms a proffer should be required was not in this case considered by the District Court.

* * *

The voice of our dissenting colleague prompts us to ponder further on this case. We are not troubled by the accusation that stare decisis has been scuttled. Our opinion reflects an attentive regard to precedent—appreciative of statements in estoppel opinions that focus on inconsistency, but appreciative, too, that these cannot be taken broadside without regard to accompanying facts and statements, reflecting the settled principle that estoppel requires prejudice wrought by detrimental reliance.

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[8] Schmidt v. Johnston, 154 Md. 125, 133, 140 Atl. 87, 90 (1928). *See* Kelley v. Hazzard, 96 Oh. St. 19, 117 N.E. 182, 184 (1917): "There is, however, another well-settled exception to the tender back, and that is where the party chargeable with the tender would, in the event of his prevailing in the suit, receive at least as much as he now has in his possession; for, in such an event, no tender is necessary, as no harm can come either to the estate or to any interested party."

[9] *E.g.*, whether the legacy is needed by the beneficiary for a reasonable standard of living; whether the legacy is being used to finance litigation of minimum substance that will put heavy costs on the estate and other beneficiaries or that will irreparably prejudice them; whether the legacy was of property of a unique and irreplaceable nature, to which the caveator would not be entitled if the will were set aside.

What we are concerned with in this epilogue is whether some sensitive nerve of justice would be rightly pained by reversal in this case. Is the "inconsistency" of a beneficiary in and of itself an affront to Justice? Should this court go beyond the actual decisis of precedent, and fashion estoppel in law out of inconsistency even in the absence of detrimental reliance or like prejudice? On occasion we have scrapped an historic rule that appears inadequate to modern conditions. E.g., *Hatch* v. *Riggs National Bank*, 124 U.S.App.D.C. 105, 361 F.2d 559 (1966). Here, however, it would run contrary to the needs of today to scrap the historic requirement of prejudice so as to make inconsistency alone a legal barrier. The rule that once prohibited a litigating party from asserting inconsistent claims in the same pleading has been relegated to the dustbin of legal history, along with the nice distinctions of the common law forms of action. The Supreme Court has brushed aside those doctrines in which inconsistency of position had come to be viewed as a bar. See *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969). In the case before us, there is no shred of waiver, all rights having been painstakingly preserved, nor is there pursuit of relief and remedies that are inconsistent.

In this case the interest of justice is furthered by our attentive regard to precedent, and to principle both settled and sound; and these may not rightly be subordinated to symmetry simpliciter. Our ruling retains estoppel in case of detrimental reliance or like injustice. We are confident that the District Court on remand will be fully alert to the principle of justice reflected in the settled doctrine applied in our ruling.

Reversed and remanded for further proceedings not inconsistent with this opinion.

TAMM, *Circuit Judge, dissenting*: I cannot concur in an opinion that elevates to the dignity of legal dogma the facetious vaunt, "Heads I win—Tails you lose." Again the majority flouts what was known among the ancients as "stare decisis"[1] (the nature of that doctrine is now imperfectly understood and possibly incapable of definition with the vocabulary that remains to us).

Craftily recognizing which side her bread is caviared on, our appellant skillfully acclaims by seizure those provisions of the now challenged will which provided largess to her and having exhausted available advantages and benefits she now brazenly challenges the validity of the very document whose terms she utilized to her own benefit.

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[1] *See* Bowen v. Howenstein, 39 App.D.C. 585, 590 (1913):

> While it is undoubtedly the rule that a person who takes property under a will must be presumed to have elected to abide by the will in preference to his rights as an heir at law, in the absence, of course, of fraud, imposition, or misrepresentation, we have found no case holding that *the temporary acceptance of such a benefit*, resulting in no disadvantage to other parties, amounts to an estoppel. On the contrary, it has been held that the *return of a legacy*, the condition of the parties not having been changed,—that is, no prejudice having resulted from the *temporary acceptance* of the legacy,—leaves no room for an estoppel. (Emphasis supplied and citations omitted.)

See also Utermehle v. Norment, 197 U.S. 40, 57 (1905) and cases cited therein:

> As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from at the same time attacking the validity of the very instrument under which he received the benefit.

See also Cennamo v. American Security & Trust Co., 318 F. Supp. 366 (D.D.C. 1970). The wealth of state cases holding as we have held in the past is so great as to negate citation.

This subordination of veracity is, of course, carried out without any distasteful return to the estate of the assets she has received and utilized. My brethren, whose sincerity I do not question (to the pure all things are pure), with more feeling for a piquant image than for objective facts see in this situation the conduct of a dove rather than an albatross. To make a paradigm of appellant's greed, at the possible expense of other named beneficiaries of testator's declared intentions, is for me the jettisoning of virtually all the historically proven cases teaching that the seeker of justice must be a doer of justice. Our opinions through this century, presumably at least, recount a record of injustices put right by our legal objectivity but my brethren's majority opinion causes my admiration of our accomplishments to melt into suspicion. Current popular recognition of a code of mini-morals is strengthened by today's ruling, since the court vaults the bounds of fairness principles and will undoubtedly shock the conscience of legal scholars. To validate appellant's unconscionable chicanery upon the basis assigned by the majority certainly requires the most novel reasoning since Lewis Carroll.[2]

More distressing than the immediate impact of this majority opinion on the fortunes of those immediately involved herein, however, is the ease with which the court again narcotizes the earlier opinions which I naively thought had established and defined the law governing factual situations akin to our present record. Perhaps by today's and tomorrow's standards these are normal times and the majesty of the law is to be built upon an ever-changing proliferation of untested and unproved panaceas. The stream of time has washed away the dissoluble fabric of many other disciplines, but if it is to flood away from

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[2] *See, e.g.*, L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND (Orig. pub. 1865), and L. CARROLL, THROUGH THE LOOKING GLASS (Orig. pub. 1872).

the courts the integrity of the law as a science producing certain rules of decision, then appellate courts will be reviewing by ambush. No doubt respect for the established tenets of the law is regarded as an idolizing of meaningless ancient landmarks by those who in their search for utopia cultivate the preposterous. It is a tired truth that courts' opinions seriatim and subjectively working towards the "GREAT WHEN" end not on a note of exhaustion but of exasperation.[3] Such brave but legally limpid judicial excursions are alternately blessed, then tarnished, then cursed. Although change is today's great constant, legal wanderings far from the solid foundations of objective interpretations of governing case law edge precariously close to an outright abandonment of the basic principle that ours is a government of laws and not of men. Although the belief that the basic provisions of our law established a predictable cornerstone upon which is built the judicial machinery apparently went out with McGuffey's readers, the hard fact remains that this so-called creative law has not established a track record for lasting solutions of mankind's day-to-day legal problems. Undiscouraged, however, my brethren bravely pursue their uncharted voyage into THE LAND OF TRY AGAIN.

I write these words, not as a jeremiad, but in the belief that unless the courts adhere to the guidance of fixed principles, we will soon bring objective law to its sepulcher.

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[3] An account of our confused and confusing roaming through the labyrinth of the insanity defense in criminal cases is a record of eighteen years from Durham v. United States, 214 F.2d 862 (D. C. Cir. 1954), to Brawner v. United States, No. 22,714 (D. C. Cir., June 23, 1972), in which we unwaiveringly in each successive case abandoned an earlier profound declaration of what we had (temporarily as it turned out) declared would be the governing law. For trial courts and the bar, the law was recognized as being whatever we would declare it to be in our next opinion.

APPENDIX E

§6335. Sale of seized property

(a) Notice of seizure.—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

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(c) Sale of indivisible property.—If any property liable to levy is not divisible, so as to enable the Secretary or his delegate by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Time and place of sale.—The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate.